

**IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA**

(CORAM: KILEO, J.A., MASSATI, J.A. And ORIYO, J.A.)

CRIMINAL APPEAL NO. 366 OF 2008

**JEREMIA BATHOLOMEO.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT**

**(Application from the Decision of the High Court
of Tanzania at Dodoma)**

(Kwariko, J.)

**dated 25th day of July, 2007
in
Criminal Appeal No. 29 of 2004**

RULING OF THE COURT

18th & 23rd March, 2010

ORIYO, J.A.:

This matter has had a chequered history in the courts. Jeremia Batholomeo was convicted as charged with the offence of rape contrary to sections 130 and 131 of the Penal Code, Cap 16, RE 2002, by the District Court of Kondoa. He was sentenced to 30 years imprisonment, 12 strokes

and ordered to compensate the victim with Shs. 100,000/=. The judgment of the trial court was delivered on 13/2/2003, (Nkolla, D.M).

He filed Miscellaneous Criminal Application No. 24 of 2003 in the High Court at Dodoma for leave to appeal out of time. On 31/3/2004, the application was granted (Kaijage, J.). His appeal in PRM Criminal Appeal No. 42 of 2004 was, however, dismissed, on 8/9/2004 (S. N. Mafuru, SRM, Extended Jurisdiction).

Undaunted, the appellant lodged DOM Criminal Application No. 1 of 2005 in this Court. The application was for enlargement of time to appeal against the decision of 8/9/2004 (Mafuru SRM, EJ).

The application was held to be incompetently before the Court and it was struck out on 29/5/2006 (Nsekela, J.A.). The appellant was directed to proceed to file the application for extension of time either in the High Court or subordinate court with extended jurisdiction.

For some reasons not apparent on the record, the appellant lodged a memorandum of appeal in the High Court on 4/10/2006; in DC Criminal Appeal No. 29 of 2004. The appeal was struck out on 25/7/2007 for being incompetent because the appellant had yet to secure an order for extension of time to appeal.

Aggrieved by the decision of the High Court, the appellant lodged a Notice of Appeal immediately after the decision, followed by a memorandum of appeal lodged on 2/11/2008.

We decided to set out the long, meandering route travelled by the appellant in the matter so that one can appreciate what follows.

At the hearing of the appeal before us, Ms. Neema Mwanda, learned Senior State Attorney appeared for the respondent Republic. The appellant appeared in person. Ms. Mwanda raised a preliminary objection that:

"The instant appeal is improper before this Honourable Court"

The Notice of the preliminary objection had been, earlier lodged in Court. The Notice of preliminary objection filed in Court showed that it was filed under:

"S 3 (2) (a) of the Appellate Jurisdiction Act, Cap 141, Vol.....(RE 2002)."

When probed by the Court on the relevancy of the cited law, Ms. Mwanda was quick to react. She conceded that the cited law was erroneous and stated the correct citation of the relevant law to be:

"Rule 4 (2) (a) of the Court of Appeal Rules, 2009."

She prayed for leave to amend the Notice of Preliminary Objection to reflect the correct law under which the objection had been filed.

The application was granted and the Notice of Preliminary Objection deemed amended accordingly.

Submitting on the merits of the preliminary objection, the learned State Attorney took us through the chequered history of the matter as already set out above.

With regard to the appeal before us, Ms. Mwanda stated that the appellant is yet to apply for the enlargement of time to appeal as directed by this Court on 29/5/2006. She submitted that in the absence of an order of court for leave to appeal out of time, the appeal before us is incompetent as it has no leg to stand on. The learned State Attorney urged us to strike out the appeal on that basis.

As already shown above, this is the unfortunate experience that the appellant has been through in this case. However, as correctly stated by Ms. Mwanda, the appellant is yet to comply with this Court's earlier decision. In DOM Criminal Application No. 1 of 2005, this Court, after taking into consideration the relevant applicable laws, stated as follows:

"The appeal in question from the District Court,
Kondoa, was heard and determined by a

subordinate court with extended jurisdiction. Consequently, reading section 11 (1) of the Appellate Jurisdiction Act, together with rules 8 and 44 of the Court of Appeal Rules, this application should be made to the High Court or subordinate court with extended jurisdiction."

Ms. Mwanda's submission on the preliminary objection finds support in the extract above. It has merit. It is not in dispute that the appellant has been in courts since, pursuing other applications / appeals, none of which has been successful. But what has escaped the mind of the appellant here is the existence of this Court's order as shown in the above extract. The appellant has yet to apply for the enlargement of time to appeal as he was directed by this Court way back in 2006.

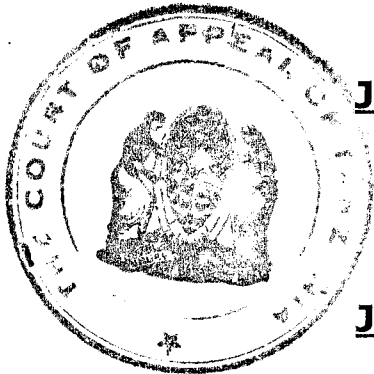
In view of the foregoing state of affairs, we are entirely in agreement with Ms. Mwanda that the appeal before us is incompetent.

In the final analysis we sustain the preliminary objection and accordingly, strike out the appeal.

In the event that the appellant is still interested to exercise his right of appeal he has to comply with the order of the Court dated 29/5/2006. He should first make an application for extension of time to appeal. Such an application to be made either in the High Court or a subordinate court with extended jurisdiction. After the extension of time to appeal is granted, then he may proceed and file in the High Court the necessary Notice of Appeal and Memorandum of Appeal.

DATED at DODOMA this 23rd day of March, 2010

E. A. KILLEO
JUSTICE OF APPEAL



S. A. MASSATI
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


E. Y. MKWIZU
DEPUTY REGISTRAR